Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation,

respondent,

and

Phil Jutras & Son Limited,

intervenor.

Board File: 26787-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation,

respondent,

and

Phil Jutras & Son Limited,

intervenor.

Board File: 26790-C

Canada

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation,

respondent,

and

Phil Jutras & Son Limited,

intervenor.

Board File: 26793-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation, TLM Logistics Inc., and JCE Logistics Inc.,

employers.

Board File: 26935-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation, Eazy Express Inc.,

employers.

Board File: 26936-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation,

respondent.

Board File: 26955-C

Canadian Union of Postal Workers,

applicant,

and

1644307 Ontario Inc., operating as Super Express,
Canada Post Corporation,

employers,

and

Diaz Enterprises Inc.,

interested party.

Board File: 27028-C

Canadian Union of Postal Workers,

applicant,

and

RMS Pope Incorporated, Canada Post Corporation,

employers.

Board File: 27029-C

Canadian Union of Postal Workers,

applicant,

and

Eazy Express Inc.,

respondent.

Board File: 27044-C
Neutral Citation: 2011 CIRB **573**
March 18, 2011

The matter at issue pertains to a proceeding already initiated before the Canada Industrial Relations Board (the Board) with regard to the above-mentioned applications and complaints assigned to a panel of the Board composed of Mr. Douglas G. Ruck, Q.C., Vice-Chairperson, and Messrs. Norman Rivard and Patrick J. Heinke, Members. This interim decision, as explained in greater detail below, deals with a request from Canada Union of Postal Workers (CUPW or the union) to withdraw the certification applications in Board files 26787-C, 26790-C, and 26793-C and hold its challenge under the *Canadian Charter of Rights and Freedoms* (*Charter* challenge) in abeyance in related applications for a single employer declaration and unfair labour practice complaints (Board files 26935-C, 26936-C, 27028-C, 27029-C, 26955-C and 27044-C). A case management meeting was held at the Board's offices in Ottawa, Ontario, on December 9, 2010, and the Board convened a meeting on February 17, 2011, at the Board's offices in Toronto, Ontario, to provide the parties with its oral decision and determine the dates and procedures by which the matters were to proceed.

Appearances

Mr. Jean-Marc Eddie, for the applicant the Canadian Union of Postal Workers;

Messrs. John Craig and Brad Elberg for the employer Canada Post Corporation;

Mr. Thomas Stefanik, for the employers Eazy Express Inc., 1644307 Ontario Inc., operating as Super Express, and RMS Pope Incorporated.;

Mr. Michel Carré, for the employer Phil Jutras & Son Limited.

These reasons for decision were written by Mr. Douglas G. Ruck, Q.C., Vice-Chairperson.

I–Nature of the Applications

[1] The Board considered a request by the CUPW to withdraw the certification applications in Board files 26787-C, 26790-C, and 26793-C. The union also asked the Board to hold its challenge under the *Canadian Charter of Rights and Freedoms* (*Charter* challenge) in abeyance in related applications for a single employer declaration and unfair labour practice complaints (Board files 26935-C, 26936-C, 27028-C, 27029-C, 26955-C and 27044-C).

[2] On February 17, 2011, the Board rendered an oral decision at the Board's Toronto offices, granting leave, in part, to withdraw the said applications and denying the union's request to hold its *Charter* challenge in abeyance in the related applications and complaints. The following are the full reasons for the Board's decision.

II–Background and Facts

[3] The historical background and chronology to these matters are well known to the parties and have been recounted in detail in the parties' respective submissions as well as in the Board's various interim decisions and rulings (see *Canada Post Corporation*, 2009 CIRB 450, upheld on reconsideration in *Canada Post Corporation*, 2009 CIRB LD 2133; and interim decision *Canada Post Corporation*, 2010 CIRB 525). Consequently, there is no need to set out the full chronology at this time, save for a brief summary of the salient facts. The applications and complaints concern workers who have entered into Combined Urban Services (CUS) or Highway Services (HS) agreements with Canada Post Corporation (Canada Post) and workers engaged in the processing, collection and delivery of lettermail and parcels and other products for Canada Post's CUS and HS contractors.

[4] Canada Post, in response to the union's applications and complaints, raised an objection to the Board's jurisdiction to proceed with these matters in light of section 13(5) of the *Canada Post Corporation Act* (the *CPCA*), which states, in part, that "a mail contractor is deemed not to be a

dependent contractor or an employee within the meaning of those terms in subsection 3(1) of the [*Canada Labour Code (Part I Industrial Relations)*]."

[5] In the certification applications, the union submitted that section 13(5) of the *CPCA* violates the *Charter*, because it limits the right of CUS and HS workers to freedom of association. In the unfair labour practice complaints and single employer applications, the union submitted that section 13(5) does not apply to the affected workers as they are not mail contractors as defined in the *CPCA*. In the alternative, the union submitted that section 13(5) violates the *Charter*.

[6] The Board consolidated the above files on October 10, 2008, for the purposes of determining the *Charter* challenge. Following various interim motions, case management meetings, procedural rulings and cancelled hearing dates, it had been agreed and confirmed that the hearing into the *Charter* question, which was initially raised by CUPW in July 2008, would commence on December 9, 2010. Several dates in January and February 2011 had also been scheduled to serve as hearing dates into the *Charter* challenge.

[7] It was the understanding of the Board that all parties, in accordance with Mr. Eddie's letter of October 29, 2010, were finalizing their preparations for the scheduled hearing. However, on November 3, 2010, CUPW, without prior indication to the Board and seemingly without consultation with the respondent employers, filed a request to withdraw the certification applications and to hold the *Charter* challenge in abeyance in the other files. The union, without the consent of the Board, also advised that it would not be filing its witness statements, books of documents and authorities as required by the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) and the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*).

[8] CUPW's letter of November 3, 2010, asked a number of things of the Board, including:

> - to obtain leave to withdraw the applications for certification in Board file nos. 26787-C, 26790-C, and 26793 C;
> - to hold the *Charter* issue in abeyance in the single employer applications and unfair labour practice complaints; and

- to determine the applicability of subsection 13(5) of the *CPCA* in the single employer applications and unfair labour practice complaints in priority.

[9] The union also asked that the Board cancel the December 9, 2010 hearing date and instead, either set that date aside for submissions on the withdrawal request or allow the parties an opportunity to present submissions on the applicability of subsection 13(5) of the *CPCA* in the single employer applications and unfair labour practice complaints.

[10] The Board directed the respondents to file written submissions in response to CUPW's request to withdraw. Due to the time constraints, the Board cancelled the December 9, 2010 hearing date and instead convened a case management meeting to discuss the union's requests. The Board outlined its concerns with the nature and timing of the union's requests and indicated that before responding to CUPW's requests, it required submissions on the following questions:

1) Irrespective of the request to withdraw the applications for certification, is it appropriate to hold the *Charter* argument in abeyance in all pending matters?

2) If the *Charter* argument is held in abeyance, at what point could the Board deem the argument to have been abandoned?

[11] Following a review of the parties' written submissions, the Board convened a meeting with the parties at its offices in Toronto on February 17, 2011–one of the dates originally scheduled for the *Charter* challenge. The Board granted the union's request to withdraw the applications for certification and denied the union's request to hold the *Charter* challenge in abeyance.

III–Positions of the Parties

A–The Union

[12] CUPW submits that it filed its request to withdraw due to the amount of time the proceedings have taken to date. According to CUPW, the parties are now in a position where the *Charter*

challenge has yet to be heard and the passage of time could result in additional complexities for the applications.

[13] The union argues that the Board's concern in monitoring withdrawals stems from the fact that an applicant could withdraw and shortly thereafter re-file a similar application and therefore avoid the six-month time bar for re-filing applications for certification that have been dismissed (section 38 of the *Regulations*). CUPW argues that this situation is different from a situation where a trade union wants to withdraw an application and re-file in order to remedy a flaw in the original application. It submits that the circumstances of this matter are exceptional.

[14] The union's request to withdraw is based primarily on the fact that two and a half years have gone by since the filing of the applications for certification and the possibility, according to the union, that the *Charter* challenge hearing may not be concluded before the fall of 2011. The union submits that if it is successful in its *Charter* challenge, then the Board will have to rule on Canada Post's submission that the CUS and HS workers are independent contractors and then consider the appropriateness of the proposed bargaining unit if the workers are determined to be employees or dependent contractors. Only after that will the Board be in a position to consider employee wishes which, in the union's submission, may be complicated by the passage of time because CUS and HS workers' contracts are typically for a period of five years. The union therefore argues that sound labour relations clearly militate in favour of granting leave to withdraw.

[15] The union submits that the single employer applications and unfair labour practice complaints are different from the applications for certification as there is a dispute over the applicability of section 13(5) of the *CPCA*. It states that, if it is correct in its position that the workers affected by these applications and complaints are not "mail contractors" as defined by the *CPCA*, it will be unnecessary to determine the *Charter* issue. The union submits that it would be more expeditious to deal with the question of the applicability of section 13(5) of the *CPCA* in priority.

[16] In response to the additional questions posed by the Board, the union submits that the Board should hold the *Charter* argument in abeyance, as there was never an agreement to treat the *Charter* issue in priority in the single employer applications and unfair labour practice complaints. CUPW submits that its primary position throughout has been that the workers covered by the single employer applications and unfair labour practice complaints are not "mail contractors" and, as such, it is only as an alternative position that CUPW is relying on the *Charter*. CUPW therefore argues that, if it no longer wishes to pursue the certification applications, the *Charter* argument is essentially no longer necessary at this stage in the proceeding and should not be heard by the Board at this time.

[17] As for the question concerning abandonment, CUPW submits that the Board could deem the *Charter* issue to have been abandoned if and when the Board finds that the employees affected by the single employer applications and the unfair labour practice complaints are not mail contractors.

[18] The union also asserts that the Board should not proceed with the *Charter* challenge as it should not be heard without a factual background that can be put squarely before the panel. CUPW submits that to do so otherwise would be tantamount to making a determination within a factual vacuum.

B–The Respondents

[19] The respondents submit that CUPW's request to withdraw is another attempt to ask the Board to deconsolidate some of the proceedings, which the Board declined to do on September 9, 2010. In the alternative, the respondents argue that the union is indirectly asking the Board to reconsider that decision without any basis for doing so.

[20] The respondents disagree with CUPW's assertion that there was never an understanding or agreement that the *Charter* issue would receive priority in all matters. The respondents submit that the parties' correspondence and the Board's rulings respecting consolidation of the files clearly indicate that the *Charter* issue was common to all matters and would be addressed as a preliminary issue in all the files. It is therefore the position of the respondents that the *Charter* issue is a live and

serious issue that, if left unresolved, will continue to be a serious and ongoing point of contention between the parties.

1–Easy Express Inc., 1644307 Ontario Inc., operating as Super Express, and RMS Pope Incorporated

[21] By letter dated February 4, 2011, Mr. Scott Geenen, President of 1644307 Ontario Inc., operating as Super Express (Super Express), advised the Board that Super Express, effective March 1, 2011, will no longer be the CUS contractor in Fredericton and, as such, Super Express no longer wished to be represented in this matter and wished to withdraw as a party to all proceedings. As none of the other parties to these proceedings objected to Super Express's request, the Board granted the request.

[22] The respondents, Eazy Express Inc. (Eazy Express) and RMS Pope Incorporated (RMS Pope), submit that the Board should dismiss the union's request to withdraw the certification applications and proceed to hear the *Charter* challenge as originally scheduled. The respondents further submit that the union is clearly not abandoning its position that section 13(5) of the *CPCA* is contrary to the *Charter*, but is instead seeking to defer that issue to another day. In their view, the union's request will not result in any greater efficiency or expedition of the hearing and will involve further delays. If the applicant is wrong on the issue of whether the workers are "mail contractors," then the parties will have to argue the *Charter* challenge in any event and will have wasted more time to determine that issue.

[23] In their response to the Board's questions posed on December 9, 2010, Easy Express and RMS Pope reiterated that the applications should be dismissed, although they agreed that the Board could allow the request to withdraw on certain conditions. Easy Express and RMS Pope submit that the *Charter* challenge is a "live" issue before the Board and that the union's request to withdraw its applications for certification does not cause the *Charter* issue to go away in the other applications and complaints. Given that the parties have litigated this case on the basis that the *Charter* challenge should proceed first, they submit it is more expeditious, fair and practical to proceed with this issue first.

[24] Easy Express and RMS Pope submit that if the union wishes to withdraw the applications for certification and to proceed with the related applications and complaints, it should only be on the basis that it is abandoning, formally, any *Charter* argument with respect to the application of section 13(5) of the *CPCA*.

2–Canada Post

[25] Canada Post submits that the withdrawal request should not be granted on an unconditional basis.

[26] Canada Post argues that the withdrawal request is an abuse of process, because it is an attempt to circumvent the Board's decision to deal with the *Charter* challenge in priority. It submits that the very late timing and circumstances of the withdrawal request speak to its abusive nature, and should lead the Board to dismiss the union's request for unconditional withdrawal. Canada Post alleges there is no valid labour relations reason for granting an unconditional withdrawal. In addition, Canada Post submits it would be prejudiced by the unconditional withdrawal, because it has committed significant time, effort and resources to responding to the union's applications for certification and the *Charter* issue.

[27] Canada Post has indicated that it will not object to the request to withdraw, provided the Board imposes conditions that: a) preserve the integrity of the process concerning the constitutionality of subsection 13(5) of the *CPCA*; b) preclude CUPW from re-filing the certification applications prior to the final determination of the *Charter* issue and for a reasonable period thereafter; and c) if the *Charter* issue is finally determined in CUPW's favour, then the union should not be permitted to re-file the certification applications, or similar applications, for a period of at least six months from the date of the final determination. Even though Canada Post states that it will not object to the request to withdraw, it also submits that the grounds put forward by CUPW in support of its request do not satisfy the criteria established by the Board.

[28] Canada Post also argues that the *Charter* issue should be determined as a preliminary matter according to the process previously established by the Board, for three reasons:

> 1) the *Charter* question is a live and significant issue in respect of the single employer applications and unfair labour practice complaints, because the union challenges the constitutionality of section 13(5) of the *CPCA* in response to Canada Post's argument that the Board does not have jurisdiction to entertain the applications and complaints on the basis of section 13(5) of the *CPCA*;
>
> 2) the Board and the parties have committed significant time and resources to adjudicating the *Charter* issue; and
>
> 3) the *Charter* issue, if left unresolved, will continue to be a significant point of contention between the parties.

[29] In response to the additional questions submitted by the Board, Canada Post argued that the Board should exercise its discretionary authority and deny the union's request to hold the *Charter* issue in abeyance, based upon the doctrine of issue estoppel and the principle against collateral attack. Essentially, it is Canada Post's argument that the Board made a decision to consolidate the files and determined that the *Charter* issue should be determined as a preliminary matter but yet, despite this fact, CUPW has consistently attempted to overturn and/or bypass the Board's decision.
[30] Canada Post also disagrees with CUPW's assertion that once the certification applications have been withdrawn, the *Charter* issue would become merely a hypothetical matter with respect to the single employer applications and the unfair labour practice complaints. Canada Post argues that, as it relies upon section 13(5) of the *CPCA* as a defense in all the consolidated matters, the *Charter* challenge is anything but a hypothetical issue.

[31] Canada Post also disagrees with CUPW's position that it would be more expeditious for the parties to address the applicability of section 13(5) to the employees who are the subject of the single employer applications and unfair labour practice complaints, as the employers may have to lead

evidence respecting the nature of their operations, the contractual obligations and relationships, as well as the legislative purposes of section 13(5) of the *CPCA*.

[32] In response to the abandonment question, the Canada Post contends that, despite the Board's decision to consolidate the proceedings 28 months ago, the union continues to challenge the Board's ruling and is either unwilling or unprepared to deal with the *Charter* issue and thus the Board should exercise its discretionary authority and declare the matter abandoned.

C–The Intervenor - Phil Jutras & Son Limited (Jutras)

[33] Jutras was granted intervenor status in the applications for certification, but not in the single employer applications and unfair labour practice complaints. It indicated that it was inclined to consent to the withdrawal of the applications for certification, given the cost of participating in these proceedings. However, Jutras indicated it preferred that the *Charter* issue be resolved now. In its submission, it is not in the public interest for the *Charter* issue to be left unresolved. However, if it is left unresolved, Jutras submitted that the union should not be permitted to challenge the constitutionality of section 13(5) of the *CPCA* in the future without giving mail contractors an opportunity to apply for intervenor status.

IV–Analysis and Decision

[34] In certain respects, the Board is inclined to view the union's letter of November 3, 2010, not so much as a request to withdraw, but rather more akin to an assertion or statement that CUPW had, in fact, decided to withdraw the certification applications and, as there was no longer a need to determine the *Charter* issue as a preliminary issue, the union was no longer obliged to file its documents or authorities as per its agreement with the respondents and undertaking to the Board in accordance with the *Regulations*. The union justified its decision by submitting that it has taken considerable time to reach this point and, as the *Charter* issue has yet to be heard, thereby possibly creating additional complexities for the certification applications, there was no longer a need to comply with the Board's directions.

[35] The Board notes that in the absence of the union's letter of November 3, 2010, the dates scheduled for December 2010 and January 2011, as well as the dates scheduled for February 2011, would have been used for the hearing into the *Charter* issue and, in all likelihood, a considerable amount of progress would have been made. Instead, the Board has found it necessary to use those very dates to deal with a request to withdraw and to hold the *Charter* issue in abeyance because, as submitted by the union, that issue has not yet been heard.

[36] The matters at hand have occupied considerable time and the parties and Board have expended considerable effort from the outset in readying themselves for a hearing into the merits of the applications and most particularly, a hearing into the preliminary *Charter* issue. As mentioned previously, the union's request to withdraw and hold the *Charter* issue in abeyance is not limited to just the certification applications, but affects other aspects of the scheduled proceedings. The Board explained to the parties at the case management meeting on December 9, 2010, that it saw these two types of requests as separate procedural issues. Therefore, for the purposes of this decision, the Board will first determine if the union has sufficient grounds to withdraw the certification applications. The Board will then examine the union's request to hold the *Charter* issue in abeyance, in light of the additional submissions filed by the parties following the Board's case management meeting.

A–Request to Withdraw

[37] It is not sufficient for a party to merely come forward and express a desire to withdraw its application or complaint once the Board has been duly seized of the matter. The processing and assessing of complaints and applications take a great deal of time, effort and expense on the part of the parties as well as the Board. Consequently, a party may not unilaterally withdraw an application or complaint without the Board's permission. A party seeking to withdraw must establish valid labour relations reasons for doing so (see *Technair Aviation Ltée* (1990), 81 di 146; and 14 CLRBR (2d) 68 (CLRB no. 812); and *Canada Post Corporation* (1987), 70 di 1; and 16 CLRBR (NS) 310 (CLRB no. 628)). The Board, as reflected in its jurisprudence, has established certain elements it considers when determining whether to grant leave to withdraw. Those elements include:

- whether the objective of promoting the practice of sound labour relations would be best served by granting a request to withdraw;
- whether allowing such a request would be in compliance with the legislative and regulatory provisions of the *Code*, including section 38 of the *Regulations*;
- whether the request could constitute an abuse of Board's processes;
- whether the respondent to the application would be unduly prejudiced; and
- whether the public interest would be best served in allowing the withdrawal.

[38] The reason or justification put forward by CUPW in seeking a withdrawal is that, in its estimation, the certification process may be complicated by the passage of time and the *Charter* challenge has yet to be heard. It is important to put the request into context. Time is at the heart of the union's request. Yet, the union's withdrawal request was made when the Board was prepared and ready to hear the union's case concerning the *Charter* challenge. The union's request was made when the respondents were prepared and ready to place their case before the Board in response to the union's *Charter* challenge. As well, the request was made when the union ought to have been ready and prepared to put forward its case. The timing of the union's request to withdraw and the reasons in support of its request are therefore questionable.

[39] The respondents argue that the union's request is prejudicial to their respective cases but, in the opinion of the Board, the focus of the alleged prejudice, as set out in the respondents' respective submissions, is not so much based upon the withdrawal of the certification applications, but stems from the union's request to hold the *Charter* issue in abeyance. As the Board is initially considering the request to withdraw the certification applications in the absence of the union's additional request, the Board is satisfied that the respondents are not unduly prejudiced.

[40] It is also argued by the respondents that the union's actions constitute an abuse of process but, once again, it is the opinion of the Board that the allegation stems more from the request to hold the *Charter* issue in abeyance than from the union's request to withdraw the certification applications, when taken in isolation.

[41] Admittedly, the union's grounds for the withdrawal request are unusual and do not reflect the specific language used by the Board. This is not a situation in which the applicant has reviewed the certification applications and found them wanting and, therefore, rather than go through the entire process, submits that the applications should be withdrawn as there is no longer a valid labour relations purpose in proceeding. Rather, it is the union's position that this is a unique situation and due to the time delays caused by dealing with the various preliminary issues, which have yet to be addressed in their entirety, sound labour relations clearly militates in favour of granting leave to withdraw in the particular circumstances of this matter.

[42] That said, the Board is cognizant of the fact that a number of substantive issues in the applications for certification remain outstanding, including whether the workers in question are independent contractors, whether the bargaining unit is appropriate for collective bargaining, and whether the majority of workers wish to be represented by the union. Although more than two and half years have elapsed since the applications for certification were filed, the parties have not yet begun arguing the substance of the case due to a number of procedural issues and objections that took up much of the parties' and Board's time. Moreover, from a practical perspective, the CUS and HS workers affected by the certification applications are typically under contract for a period of five years. It is therefore likely, given the litigious history of the parties, that the contracts in question will have expired by the time the Board has an opportunity to fully dispose of these applications.

[43] The Board must also remain cognizant of the fact that there exists a level of support for the withdrawal from the respondents. Canada Post, subject to requesting that the Board impose certain conditions, does not oppose the union's request to withdraw the certification applications. The intervenor, Jutras, supports Canada Post's position and does not object to the union's request. While Eazy Express, and RMS Pope oppose the request and ask that the Board refuse leave to the union, the Board is satisfied that their true concerns, as noted previously, are directed at the union's request to hold the *Charter* challenge in abeyance in the other matters and not the request to withdraw the certification applications.

[44] The Board is satisfied that the concerns of Eazy Express, and RMS Pope, as well as the conditions requested by Canada Post, can be adequately addressed without denying the union's

request to withdraw in full. The Board distinguishes between cases in which it has considered an application for certification and dismissed it, and cases in which it grants leave to withdraw. In the latter situations, the Board is not inclined to impose a time bar. It is the opinion of the Board that a time bar is not warranted at this time. If, in fact, the union should re-apply for certification at some point in the future and prior to the final determination of the related matters, the Board would be prepared to hear from the respondents as to why the application should not be considered at that time.

[45] The Board is therefore prepared to grant the union leave to withdraw the certification applications.

B–Request to Hold the *Charter* Challenge in Abeyance

[46] One of the main points of contention arising from CUPW's request to withdraw the certification applications was the accompanying request that the *Charter* issue be held in abeyance. The union submits it is appropriate to do so, as there was never an understanding or agreement that the *Charter* question would be determined in priority in the single employer applications and unfair labour practice complaints. The respondents do not agree with this contention and the Board shares that view. It is the Board's finding that CUPW's position is simply not supported by the events that have transpired to date. The Board's previous rulings, which are numerous, as well as the correspondence between the Board and the parties, clearly indicate that these matters were consolidated because of the existence of a common preliminary issue that impacted directly on each and every one of the consolidated files–and that issue is the *Charter* challenge (see *Canada Post Corporation (450)*, *supra*; and *Canada Post Corporation, (525)*, *supra*). The Board, before determining that a consolidation was justified, sought submissions from the parties and, after due deliberation, ruled that consolidation was appropriate, as a consequence of the *Charter* challenge. For the union to now say there was no agreement or understanding ignores the reality and the Board's previous rulings.

[47] The union also argues that the *Charter* issue should not be heard because:

> For the Board to hear the *Charter* challenge prior to the determination of whether the workers are "mail contractors," the constitutional validity of subsection 13(5) would have to be determined in the hypothetical as the violation of the *Charter* rights is currently only speculative. *Charter* challenges should not be determined in such a "factual vacuum."

[48] The union's argument is premised upon its position that the *Charter* challenge is no longer a live issue at this stage, as it has decided to forgo the certification applications. However, as set out previously, the Board does not share this view. The *Charter* issue, even in the absence of the certification applications, would not exist within a vacuum as the issue was also found to apply to the single employer applications and the unfair labour practice complaints. That being the case, the *Charter* issue remains a live issue that will have to be addressed by this Board as part of the outstanding files.

[49] The union, as part of its withdrawal request, also asks that the Board, while holding the *Charter* issue in abeyance, determine the applicability of subsection 13(5) of the *CPCA* in the single employer applications and unfair labour practice complaints in priority. CUPW, in its submissions in support of its request to withdraw the certification applications, had indicated that it was prepared to argue the applicability of section 13(5) on the single employer applications and unfair labour practice complaints on December 9, 2010. However, in the absence of any form of consultation with the other parties, the respondents were not prepared to proceed with this issue solely upon the basis of oral argument. The respondents, in their submissions, seem to have a somewhat different view as to how a hearing into the single employer applications and unfair labour practice complaints would proceed and have indicated that, in all likelihood, they would want to call witnesses with respect to certain aspects of hearing. The Board also notes that the union places a fair degree of significance on a previously rendered Board decision (see *Eazy Express Inc.*, 2010 CIRB LD 2277) in which it was found that employees of Easy Express were not mail contractors. However, the union fails to mention that the *Charter* was neither raised nor considered in that case. Whereas, in the present matters, the *Charter* has been put forward in response to the respondent's reliance upon section 13(5) of *CPCA* as a substantive defense to the applications and complaints.

[50] It is not uncommon for the courts and administrative bodies to hear preliminary issues concurrently, as such matters often arise from the same factual background, are argued by the same parties and require many of the same witnesses. In the Board's assessment, the two preliminary issues (the applicability of section 13(5) of the *CPCA* and the *Charter* validity of section 13(5)) can be dealt with in such a manner, given their points of commonality. As it has been determined that the *Charter* issue remains before the Board as a live issue, and so as not to make a determination on the *Charter* issue in a vacuum, the Board will hear from the parties on the applicability of subsection 13(5) of the *CPCA* in the single employer applications and unfair labour practice complaints concurrently with the *Charter* challenge.

[51] Although counsel for CUPW indicated that he was prepared to present the case for the union on the applicability of section 13(5) by way of oral argument, the Board appreciates that the respondents may require additional time to prepare their respective cases. Consequently, the hearing into these issues will open with the *Charter* challenge so the parties may better determine what evidence and/or material is common to both preliminary issues and thereby possibly reduce the time required to present their cases in the single employer applications and unfair complaints.

[52] As mentioned at the outset, the Board had also posed a question concerning abandonment. In view of the above rulings, it was not necessary to make a determination as to when the Board could deem the *Charter* challenge to have been abandoned.

V–Conclusion

[53] Based upon the foregoing, the Board:

- granted CUPW leave to withdraw the certification applications in Board files 26787-C, 26790-C, and 26793 C;
- denied CUPW's request to hold the *Charter* challenge in abeyance;

- directed that the *Charter* challenge and applicability of subsection 13(5) of the *CPCA* will be heard concurrently as preliminary issues with respect to the single employer applications and unfair complaints.

VI–Subsequent Developments

[54] Since the time the Board rendered its oral ruling and these reasons were prepared, the union advised the Board on February 25, 2011, that it no longer intends to pursue the *Charter* challenge. The union was informed that, in doing so, it will no longer be able to raise the *Charter* question in the context of these proceedings. In response to the union's correspondence, Canada Post did not oppose the union's withdrawal of the *Charter* challenge, but advanced that certain conditions should be attached. First, it noted that the Board should remain seized of the *Charter* challenge as it currently stands before the Board, until the Board determines the underlying single employer applications and unfair labour practice complaints. Second, it submits that the Board should impose a time bar on CUPW concerning the reactivation or re-litigation of the *Charter* issue. Canada Post stated that CUPW should be prohibited from directly or indirectly challenging the constitutionality of section 13(5) of the *CPCA* in these consolidated proceedings or in another proceeding before the Board, until the final determination of the single employer applications and unfair labour practice complaints or for one year, whichever is longer.

[55] The Board finds that the union has now effectively abandoned its *Charter* challenge. It will therefore not be permitted to re-initiate its *Charter* argument in the course of the single employer applications and unfair labour practice complaints. However, the Board is not inclined to impose a time-bar on the re-initiation of the *Charter* challenge in the context of another proceeding, for the same reasons it did not impose a time bar in the context of the withdrawal of the certification applications.

[56] Lastly, Canada Post had previously requested that the Board provide written reasons for its ruling on the admissibility of the union's expert report. These reasons were supposed to be provided when the Board rendered its final decision on the *Charter* challenge. However, given the change of

circumstances, the Board will determine if and when it is appropriate to provide reasons on the admissibility question.

[57] This is a unanimous decision of the Board.

Douglas G. Ruck
Vice-Chairperson

Norman Rivard
Member

Patrick J. Heinke
Member